No. 97-2024

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* (SUPREME COURT RULES, RULE 39)

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COMES NOW Respondent DOUGLAS DANIEL CLARK in the above-entitled matter and presents this motion for leave to proceed *in forma pauperis*. This motion is based on Supreme Court Rules, Rule 39, and is based on the following facts.

Respondent is an indigent death row inmate at the California State Prison at San Quentin, California. On February 7, 1994Respondent was appointed counsel by the Honorable United States District Court Judge Robert M. Takasugi. Said appointment of counsel was made pursuant to Local Rule 26.8.4 of the United States District Court, Central District, California. Leave to proceed *in forma pauperis* has not been sought by Respondent in any other court. As Respondent was appointed counsel pursuant to federal statute, no affidavit or declaration accompanying this motion is required.

For the foregoing reasons, Respondent DOUGLAS DANIEL CLARK respectfully requests that this court grant his motion for leave to proceed *in forma pauperis*.

DATED: August ___, 1998.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHAEL S. MAGNUSON, Attorney for
DOUGLAS DANIEL CLARK

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
DOUGLAS DANIEL CLARK

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court's order denying a motion to dismiss a habeas corpus petition as unauthorized is immediately appealable pursuant to the "collateral order" exception to 28 USC § 1291.

2. Whether it is within the district court's sound discretion to address the merits of an unauthorized habeas corpus petition.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent DOUGLAS DANIEL CLARK respectfully submits this brief in opposition to the Petitioner for Writ of Certiorari to the Court of Appeals for the Ninth Circuit filed herein by Petitioner Arthur Calderon, Warden of the California State Prison at San Quentin.

STATEMENT OF THE CASE

Respondent DOUGLAS DANIEL CLARK is a death-row inmate in custody at the California State Prison, San Quentin. Following his conviction in 1983, the California Supreme Court affirmed the judgment and penalty in 1992. Thereafter, Respondent sought habeas corpus relief in federal court. He requested and received appointed counsel by order of United States District Court Judge Robert M. Takasugi. On April 23, 1997, Respondent filed his Petition for Writ of Habeas Corpus which contains twenty-seven separate claims for relief.

Respondent has never disavowed his intention and desire to pursue habeas relief. However, the relationship between Respondent and his appointed counsel was, at best, strained. This resulted in Respondent personally verifying the first fifteen claims of his petition while his appointed counsel verified the remaining claims.

Petitioner therefore filed a motion to dismiss the habeas petition as unauthorized, or, in the alternative, to compel full verification. Respondent's appointed counsel filed a detailed opposition thereto. The specific circumstances of the disagreements between Respondent and his appointed counsel regarding the verification of his claims were set forth in detail by appointed counsel in the opposition. Thus, the district court fully addressed the facts surrounding this issue when it considered the motion to dismiss. By this time, the relationship between Respondent and his appointed counsel deteriorated to the point where Respondent filed a notice of objection to continued

representation by appointed counsel as well as an "Opposition" to the appointed counsel's opposition to the motion to dismiss.

On July 30, 1997, the district court issued two orders. The first granted Respondent's request to discharge counsel, and present counsel was appointed. The second denied Petitioner's motion to dismiss or, in the alternative, to compel full verification. The district court's order stated that "[Respondent's] verification of a limited number of claims in the petition suffices to ensure that he is endorsing the prosecution of the habeas action and his interests are not being advanced by an intermeddler."

On August 27, 1997, Petitioner filed a "collateral order" notice of appeal challenging the district court's ruling. On March 6, 1998, the Ninth Circuit Court of Appeals issued its order, stating, in pertinent part: "The state's collateral order appeal is DISMISSED pursuant to *Cohen v. Beneficial Loan Corp.*, *337 U.S. 541, 546-47 (1949)*. We hold that briefs are not necessary to our decision." The certiorari petition then followed.

SUMMARY OF REASONS FOR DENYING THE WRIT

The district court's order is not immediately appealable as a "collateral order" exception to *28 USC § 1291*. Petitioner has not and cannot demonstrate a recognized protected interest or asserted right that will be deprived absent immediate appeal. Furthermore, the district court's order does not resolve an important issue completely separate from the merits of the action; rather, the determination of which claims in Respondent's habeas corpus petition will be litigated, if any, is part and parcel of habeas action itself.

Irrespective of the appealability issue, the district court did not abuse its discretion in addressing the merits of Respondent's habeas corpus petition. It is well established that the district court can reach the merits of an unverified petition; the defect is one that the district court may, if

it sees fit, disregard. Based upon careful review of the voluminous record before it, the district court clearly did not err in accepting the petition.

ARGUMENT

I

AN ORDER DETERMINING WHETHER A STATE PRISONER HAS COMPLIED WITH 28 U.S.C. § 2242 WITH RESPECT TO VERIFYING HIS PETITION FOR WRIT OF HABEAS CORPUS IS NOT IMMEDIATELY APPEALABLE PURSUANT TO THE COLLATERAL ORDER EXCEPTION TO 28 U.S.C. § 1291.

A. The requirements of *Cohen v. Beneficial Industrial Loan Corporation* and its progeny are not satisfied.

Petitioner's primary argument is that the district court's order denying its motion to dismiss the habeas corpus petition as unauthorized is immediately appealable under *28 U.S.C. § 1291* by virtue of the so called "collateral order" exception first enunciated in *Cohen v. Beneficial Industrial Loan Corporation ,337 U.S. 541 (1949)*. Whether an order falls within the "collateral order" exception is an issue this court has revisited on many occasions. In *Gulfstream Aerospace Corporation v. Mayacamas Corporation 485 U.S. 271 (1988)*, this court succinctly summarized the law in this regard:

> "Petitioner's principal contention in this case is that the district court's order denying the motion to stay or dismiss the federal court litigation is immediately appealable under § 1291. That section provides for appellate review of 'final decisions' of the district courts. This court has long stated that as a general rule a district court's decision is appealable under this section only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but

> execute the judgment.' *Gulfstream Aerospace Corporation v. Mayacamas Corporation 485 U.S. 271 (1988)*, *Catlin v. United States 324 U.S. 229, 233 (1945)* . . . in *Cohen v. Beneficial Industrial Loan Corporation 337 U.S. 541 (1949)*, however, we recognized a 'small class' of decisions that are appealable under § 1291 even though they do not terminate the underlying litigation. *Id. at 546*. We stated in *Cohen* that a district court's decision is appealable under § 1291 if it 'finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' The petitioner asserts that the district court's decision in this case falls within *Cohen's* 'collateral order' doctrine."
>
> "Since *Cohen*, we have had many occasions to revisit and refine the collateral order exception to the final judgment rule. We have articulated a three-pronged test to determine whether an order that does not finally resolve a litigation is nonetheless appealable under § 1291. See *Coopers & Lybrand v. Livesay 437 U.S. 463 (1978) (other citations omitted)*. First, the order must 'conclusively determine the disputed question.' *Coopers & Lybrand v. Livesay 437 U.S. at 468*. Second, the order must 'resolve an important issue completely separate from the merits of the action.' *Ibid.* Third, and finally, the order must be 'effectively unreviewable on appeal from a final judgment.' *Ibid.* If the order at issue fails to satisfy any one of these requirements, it is not appealable under the collateral-order exception to § 1291." *Gulfstream Aerospace Corporation v. Mayacamas Corporation, 485 U.S. at 275-276 (emphasis added)*.

The district court's order here is not a "final decision" that "ends the litigation on the merits" for purposes of § 1291 review. In fact, the exact opposite is true; the order maintains this case in litigation at the district court level. Thus, this case is directly on point with *Gulfstream Aerospace Corporation v. Mayacamas Corporation, supra*, wherein the court stated: "The order in this case has no such effect: indeed, the order ensures that litigation will continue in the District Court." *485 U.S. at 275*. Thus, Petitioner can only prevail if it is shown that the order at issue here is one of the "small class" of decisions that are appealable under § 1291 even though they do not terminate the

underlying litigation. Respondent respectfully contends that the order does not fall within that class as it does not satisfy any of the requirements mandated by *Cohen* and its progeny.

First, following the language of *Cohen* itself, it cannot be seriously argued that the State's interest in not being subjected to unauthorized habeas proceedings is a "claim of right" within the meaning of the *Cohen* holding. Petitioner's claim that such a right of the State is merely the "flip side" of the Constitutionally protected double jeopardy rights afforded criminal defendants is a leap that is not and cannot be supported by any controlling authority. The States simply are not entitled to the same protections our Constitution guarantees to individuals.

Thus, Petitioner's claim that "it is the very delay in the execution of the State's laws which can be likened to forcing a defendant to undergo repeated trials and awaiting appeal for vindication" is simply not the same type of "claim of right" that *Cohen* contemplated. It is for this reason that the cases applying the *Cohen* exception, even those cited by Petitioner, invoke universally accepted constitutional, statutory or other rights: *Stack v. Boyle, 342 U.S. 1 (1951)*, (violation of criminal defendants statutory and constitutional right to bail); *Abney v. United States, 431 U.S. 651 (1977)*, (adverse ruling on a double jeopardy claim); *Helstoski v. Meanor 442 U.S. 500 (1979)*, (denying immunity under the Speech and Debate Clause); *Nixon v. Fitzgerald, 457 U.S. 731 (1982)*, (denying a civil defendant's motion to dismiss based upon absolute immunity from suit for civil damages arising from actions taken while he was President of the United States); *Mitchell v. Forsyth, 472 U.S. 511 (1985)*, (denying government officials qualified immunity from damages suits); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc., 506 U.S. 139 (1993)*, (stating Eleventh Amendment immunity from suit in federal court may be vindicated by immediate appeal under collateral source doctrine); and *Cohen* itself, where the "claim of right" was the statutorily mandated provision that a plaintiff in a stockholder's derivative action must post security for reasonable

expenses incurred by the defense. The distinction between these fundamental rights and the novel "State's rights" asserted by Petitioner is glaring.

In first announcing the "collateral order" exception, the *Cohen* ruling set forth the standard for "claims of right" by stating as follows: "But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in the final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." 337 U.S. at 546; "We hold this order appealable because it is a final disposition of a claimed right. . . here it is the right to security that presents a serious and unsettled question." *Id. at 546-547.* (Emphasis added). It is therefore clear that Petitioner's specious "claim of right," that the State can demand that it not be forced to undergo "useless federal habeas litigation," is simply not a recognized right by virtue of either the Constitution, statute or any other authority for purposes of invoking the exception to § 1291.

Since the district court's order did not deprive Petitioner of a claimed right, there is no need to apply the *Cohen* test. As stated in *Gulfstream Aerospace Corp. v. Mayacamas Corp. , 806 F.2d 928 (9th Cir. 1986)*: "Before the *Cohen* test will apply, the appellant must show that the district court's erroneous decision will deprive him of some protected interest. (citations omitted). Here, Gulfstream. . .is not deprived of a protected interest. Thus, we do not reach the *Cohen* test, and we find the order nonappealable." *806 F.2d at 930.*

Nonetheless, even assuming arguendo that the State's claim of right is adequate (the State's right not to be subjected to 'unauthorized' habeas proceedings; the State's right not to be forced to litigate an unauthorized habeas petition with its intended delay) this "right" is not "separable from, and collateral to, rights asserted in the action. . .independent of the cause itself," as mandated by

Cohen. On the contrary, the decision whether or not a state must litigate unauthorized habeas claims will actually determine which specific rights may be asserted by the prisoner in the habeas action. Petitioner's argument that it need not litigate unauthorized claims in a habeas petition is not "independent of the cause itself" where the cause is, quite simply, the constitutional claims for relief as set forth in the habeas petition. In other words, if this court was to address the merits of Petitioner's appeal, the result would be an order setting forth the parameters of Respondent's habeas corpus petition, claim by claim. Surely this is not separable from, collateral to, nor independent of the cause itself.

This is in sharp contrast to *Cohen* , where the claim of right was simply the requirement that the plaintiff must post security for reasonable expenses incurred by the defense; this correctly was deemed completely "seperatable from, and collateral to," the issues in the underlying stockholder's derivative action. The same is true for *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, *supra*. There, the district court's order denying a motion to stay or dismiss the action because a similar suit was pending in the State court was similarly considered collateral to the merits of the breach of contract actions themselves that had been filed in both federal and state court. Here, on the other hand, the "claims of right "at issue—which Constitutional claims will comprise Respondent's habeas petition as a result of the state's purported right to not litigate unauthorized claims–are one and the same.

It is for this same reason that Petitioner fails to satisfy prong two of the three-pronged test to determine whether an order that does not finally resolve litigation is nonetheless appealable under § 1291, as set forth in *Coopers & Lybrand v. Livesay*, *supra*. Prong two requires that the order must "resolve an important issue completely separate from the merits of the action." As stated above, the issue here is part and parcel of the merits of the underlying action, namely, which, if any,

constitutional grounds for relief set forth in respondent's habeas corpus petition will be litigated. As such, the order is not appealable under the collateral order exception to § 1291 because it fails to satisfy one of the requirements of the three-pronged test. *Gulfstream Aerospace Corp. v. Mayacamas Corp., supra, 485 U.S. at 275-276.*

In sum, the "collateral order" exception to § 1291 is limited to a "small class" of decisions. *Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546.* This case clearly does not meet the criteria to be included within that class. If Petitioner's argument was to succeed, a flood of collateral order appeals would flow from the frequent cases challenging the authorization of habeas proceedings. Furthermore, Petitioner's fear of widespread relitigating entire cases after a habeas petition has been declared null and void has not materialized, despite the literally thousands of habeas petitions that have been filed. Thus, Petitioner's unrecognized "claim of right" would result in an enormous expansion of the collateral order exception despite being based purely on the unsubstantiated fear that "an authorized habeas petition may later be potentially considered to be void by a federal court." (Petitioner's brief, p. 17) (emphasis added). Petitioner's argument must therefore be rejected.

II

IRRESPECTIVE OF THE APPEALABILITY ISSUE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ACCEPTING THE PETITION FOR WRIT OF HABEAS CORPUS.

Petitioner's blanket assertion that Respondent's habeas corpus petition should be dismissed for lack of verification is also without merit. The district court did not abuse its discretion in accepting the petition as filed. The petition is sufficiently verified, and the district court is

empowered to address its merits even if unverified. Thus, the instant matter is easily distinguished from the cases cited by Petitioner in that Respondent did verify the petition and does want his writ of habeas corpus to go forward. As such, it was not error for the district court to deny Petitioner's motion to dismiss.

A. Even assuming arguendo the petition is not sufficiently authorized, it is well established that a district court has the discretion to address the merits of an unverified petition.

28 U.S.C. § 2242 states, in pertinent part: "Application for a writ of habeas corpus shall be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his behalf." (emphasis added). The requirements of § 2242 have been liberally construed. As the court stated in *Morris v. United States of America 399 F.Supp. 720 (E.D. Va., 1975)*, "In accordance with this policy, the requirements of *28 U.S.C. § 2242* must be tolerantly interpreted with respect to prisoner petitions. . .The petitioner need not demonstrate a physical or mental handicap to justify an agent's signature; other grounds of necessity, as have been alleged here, will suffice (citations omitted). . .Furthermore, a lack of formal 'verification' should not be allowed to defeat prisoners' constitutional claims." *399 F.Supp at 722-723.*

In *Hendricks v. Vasquez , 908 F.2d 490 (9th Cir. 1990)*, respondent Attorney General of the State of California contended that the district court was without jurisdiction to consider Hendrick's petition for writ of habeas corpus because, although the petition was signed by Hendrick's counsel, it was not signed and verified personally as required by Rule 2 of the Rules Governing § 2254 Cases and *28 U.S.C. § 2242*. The court responded to this argument as follows:

> "The respondents cite no authority for the proposition that it is reversible error for the District Court to address the merits of an unverified petition. The District Court may refuse to file, or may dismiss, an unsigned and unverified petition. *In Re: Application of Gibson, 218 F.2d 320 (9th Cir. 1954)* (affirming the District Court's

> refusal to file an unverified petition) (citations omitted). However, the defect is one that the District Court may, if it sees fit, disregard. *Morris v. United States, supra, 399 F.Supp. 720, 723 (E.D. Va. 1975)* (addressing the petitioner's constitutional claim despite the lack of verification); *Cresta v. Eisenstadt 302 F.Supp. 399 (D. Mass. 1969)* (addressing the merits of an unverified petition signed by the petitioner's counsel where the respondent failed to raise the issue); *Lewis v. Connett 291 F.Supp. 583 (W.D. Ark. 1968)* (finding that the petitioner's failure to verify the petition did not preclude the District Court from exercising jurisdiction). Indeed, Rule 2(e) provides that a petition which does not meet Rule 2's requirements "may be returned to the petitioner, if a [District Court] judge. . .so directs." *908 F.2d at 491* (emphasis added).

The district court therefore did not abuse its discretion in accepting the habeas petition and thereby denying the motion to dismiss. As is clear from the record, the factual chronology in this case is long and complicated as it pertains to the verification issue. It was within the district court's sound discretion whether or not to address the merits of the habeas corpus petition, regardless of verification status.

B. Nevertheless, the petition is sufficiently verified.

As noted above, the factual circumstances surrounding this matter are convoluted. However, this much is clear: Respondent verified claims one through fifteen in his petition, Respondent's prior counsel explained at length the circumstances surrounding the verification issue, and Respondent has never renounced his desire and intent to continue with his quest for habeas relief. As the Appendix to Petitioner's writ makes clear, the district court was provided numerous documents pertaining to the factual history behind the verification issue. Based on the inherent power of the district court to address the verification issue, it cannot be said the district court abused its discretion under the facts of this case by finding the petition sufficiently verified.

The facts of this case are easily distinguishable from those in the case principally relied upon by Petitioner, *Deutscher v. Angelone 16 F.3d 981 (9th Cir. 1991)*. In that case, Deutscher's lawyer

confirmed that he filed the petition without notifying Deutscher or seeking his authorization. The lawyer mailed Deutscher a copy of the petition after filing it, but never explained the nature of federal habeas corpus proceedings, the risk that claims not raised might be barred as abuse of the writ, or the appropriateness of having other counsel file the petition. *Deutscher, 16 F.3d at 984.*

Here, on the other hand, the record is clear that Respondent wanted a habeas corpus petition filed on his behalf; he simply had disagreements with his prior counsel regarding the specifics thereof. Thus, this case does not present the situation where counsel was preparing and verifying a petition without the prisoner's knowledge, or otherwise acting as an "intruder or uninvited meddler" as is feared with "next friend" petitions.

Respondent relies on a case 115 years old in order to analogize the instant habeas corpus issues with civil actions wherein the client must commence litigation in order for it to exist. *Ex Parte Tom Tong 108 U.S. 556 (1883).* Even following this holding, it is indisputable that Respondent himself has been very active, and has fully agreed with, the bringing of his habeas corpus petition. His disagreements with prior counsel were analyzed in depth by the district court, by way of points and authorities and declarations. The district court's findings in this regard should not be disturbed as there was clearly no abuse of discretion. Thus, irrespective of the appealability of the district court's ruling, there was no error in accepting the petition and denying the motion to dismiss.

CONCLUSION

The district court's order denying the motion to dismiss is not appealable as a collateral order exception to *28 U.S.C. § 1291.* Furthermore, the district court did not abuse its discretion in

accepting the petition for writ of habeas corpus and denying the motion to dismiss. Thus, it is respectfully requested that the petition for writ of certiorari be denied.

DATED: August 13, 1998.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHEL S. MAGNUSON, Attorney for
Respondent DOUGLAS DANIEL CLARK

DATED: August 13, 1998.

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